STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of HILLARY MARSHALL, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JEFFREY CUNNINGHAM,

Respondent-Appellant,

and

SHANNON DOHERTY,

Respondent.

UNPUBLISHED
September 11, 2003

No. 246918
Shiawassee Circuit Court
Family Division
LC No. 02-010157-NA

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Respondent-appellant Jeffrey Cunningham (hereafter "respondent") appeals as of right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(h). We affirm.

We find no merit to respondent's argument that the trial court lacked jurisdiction to terminate his parental rights because he was not personally served with notice of the proceedings. "Whether a court has personal jurisdiction over a party is a question of law, which this Court reviews de novo." *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000). In this case, although respondent personally appeared at both the plea-based adjudication proceeding and at the termination hearing, he never challenged the propriety of service upon himself. Because respondent did not preserve this issue by raising it below, our review is limited to plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCL 712A.13 and MCR 5.920(B)(4)(a)[1] generally require personal service of a termination petition and summons. *In re Terry*, *supra* at 21; see also *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). Under MCL 712A.13 and MCR 5.920(B)(4)(b), however, when personal service is "impracticable," the court may direct that a party be served by registered or certified mail. See also *In re Mayfield*, 198 Mich App 226, 231-232; 497 NW2d 578 (1993). Here, these proceedings were initiated in Owosso, but respondent was incarcerated in Lapeer. Under the circumstances, it was not plain error to allow respondent to be served by certified mail. Although the record does not indicate that a hearing was held to determine whether personal service was impracticable, or that an order was entered to that effect, neither of these is required by MCL 712A.13 or MCR 5.920(B)(4)(b). Therefore, respondent has not demonstrated a plain error relating to service.

Furthermore, respondent has no standing to challenge the propriety of service upon the child's mother or the father of the child's brother. Improper service upon a parent voids only the proceedings with respect to the parent who was not properly served. *In re Terry*, *supra* at 21, n 2.

Respondent also argues that the trial court clearly erred in finding that termination was warranted under MCL 712A.19b(3)(h). Where termination of parental rights is sought, the existence of a statutory ground for termination must be proven by clear and convincing evidence. MCR 5.974(A) and (F)(3); *In re Miller*, 433 Mich 331, 344-345; 445 NW2d 161 (1989); see also MCL 712A.19b(1). The trial court's findings of fact are reviewed for clear error and may be set aside only if the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 5.974(I); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

Under MCL 712A.19b(3)(h), a respondent's parental rights may be terminated if

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

Respondent argues that the trial court clearly erred in finding that there was no reasonable expectation that he would be able to provide for the child's proper care and custody within a reasonable time. We disagree.

The evidence established that respondent would be imprisoned until at least October 2008. Before respondent was incarcerated, the children were under guardianship with their maternal grandmother, but that guardianship was subsequently dissolved and the grandmother committed suicide. Respondent did not testify or present witnesses at the termination hearing. Moreover, there was no evidence that respondent had contacted other family members, that other

[1] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

family members were willing to provide care for the child within a reasonable time, or that respondent asked petitioner to investigate other possible relative placement and petitioner failed to do so. The court did not clearly err in finding that there was no reasonable expectation that respondent would be able to provide proper care for the child within a reasonable time, considering her age of ten years.

Lastly, respondent argues that it is presumed to be in a child's best interests to have a strong relationship with both parents, that children over the age of twelve have a right to decide their custodial parent, and that the trial court erred in denying his request to correspond with his child, without asking the child her preference or taking evidence on the subject. We disagree.

Respondent correctly observes that, under the Child Custody Act, "[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3). The Child Custody Act also requires a court to consider a child's custodial parent preference, if the court deems the child to be old enough to express a preference. MCL 722.23(i). However, the Child Custody Act does not apply to this case. Rather, once a statutory ground for termination is validly established, "the court shall order termination of parental rights . . . unless the court finds that termination . . . is clearly not in the child's best interests." MCL 712A.19b(5). That determination is made upon the evidence on the whole record, and is reviewed for clear error. *In re Trejo*, 462 Mich 341, 353-354, 356; 612 NW2d 407 (2000).

Although a court at a termination proceeding *may* consider the statutory best interest factors, MCL 722.23(a) – (l), it is not required to do so. *In re EP*, 234 Mich App 582, 594; 595 NW2d 167 (1999). In this case, the evidence indicated that respondent had maintained only sporadic contact with the child. The evidence did not show that termination of respondent's parental rights was clearly not in the child's best interests. Thus, the court did not err in terminating respondent's parental rights to the child.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello